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DISPATCH

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Detroit, Howe and Jacksboro, Texas, Antlers
and Hugo, Oklahoma)¹

MM Docket No. 97-26 ✓
RM-8968
RM-9089
RM-9090

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Lewisville, Gainesville, Robinson
Corsicana, Jacksboro, and Mineral
Wells, Texas)

MM Docket No. 97-91
RM-8854
RM-9221

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1998

Released: August 21, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the Notice of Proposed Rule Making in MM Docket No. 97-26, 12 FCC Rcd 1810 (1997), and the Notice of Proposed Rule Making and Order to Show Cause in MM Docket No. 97-91, 12 FCC Rcd 3059 (1997). Inasmuch as one aspect of the proposal set forth in MM Docket No. 97-91 proposes the substitution of Channel 237A for Channel 299A at Jacksboro, Texas, which conflicts with a counterproposal in MM Docket No. 97-26, it is necessary to consolidate these Dockets. For the reasons discussed below, we are allotting Channel 294C2 to Detroit, Texas, and Channel 222C2 to Antlers, Oklahoma. In addition, we are modifying the construction permit of Station KECS, Channel 300C2, Gainesville, Texas, to specify operation on Channel 300C1 at Lewisville, Texas, and are modifying the license of Station KICI, Channel 300C1, Corsicana, Texas, to specify operation on Channel 300A at Robinson, Texas. In order to accommodate these two reallocations, we are substituting Channel 237A for Channel 299A at Jacksboro, Texas, and are modifying the construction permit for Station KJKB, Jacksboro, to specify operation on Channel 237A.

Background

2. At the request of Great Plains Radiocasting, the Notice in MM Docket No. 97-26 proposed the allotment of Channel 294C2 to Detroit, Texas, as a first local service. In response to that Notice, K95.5, Inc. filed a counterproposal proposing the allotment of Channel 294C2 to Antlers, Oklahoma, as a first local service. Also in response to the Notice, Metro Broadcasters-Texas, Inc. ("Metro

¹The communities of Howe and Jacksboro, Texas, and Antlers and Hugo, Oklahoma have been added to the caption in MM Docket No. 97-26.

Broadcasters"), licensee of Station KHYI, Channel 237C3, Howe, Texas, filed a counterproposal proposing the substitution of Channel 237C2 for Channel 237C3 at Howe, and modification of its Station KHYI license to specify operation on Channel 237C2. In order to accommodate this upgrade, Metro Broadcasters also proposed the substitution of Channel 294C2 for Channel 238C2 at Hugo, Texas, and modification of the license of Station KITX, Hugo, Texas, to specify operation on Channel 294C2.

3. In a related context and at the request of Heftel Broadcasting Corporation ("Heftel"), permittee of Station KECS, Channel 300C2, Gainesville, Texas, and licensee of Station KICI, Channel 300C1, Corsicana, Texas, the Notice of Proposed Rule and Order to Show Cause in MM Docket No. 97-91 set forth two reallocation proposals. First, Heftel proposed the substitution of Channel 300C1 for Channel 300C2 at Gainesville, the reallocation of Channel 300C1 to Lewisville, Texas, and modification of its Station KECS construction permit to specify operation on Channel 300C1 at Lewisville. Second, Heftel proposed the substitution of Channel 300A for Channel 300C1 at Corsicana, the reallocation of Channel 300A to Robinson, Texas, and modification of its Station KICI license to specify operation on Channel 300A at Robinson. The Channel 300A substitution to Robinson is necessary to accommodate the Channel 300C1 upgrade at Lewisville. In order to accommodate both of these reallocations, Heftel also proposed the substitution of Channel 237A for Channel 299A at Jacksboro, Texas, and the modification of the Station KJKB construction permit at Jacksboro to specify operation on Channel 237A. In turn, the Channel 237A substitution at Jacksboro required Heftel to also propose the substitution of Channel 240C3 for Channel 240C1 at Mineral Wells, Texas, and modification of the Station KYXS license at Mineral Wells to specify operation on Channel 240C3.

4. In response to the Notice of Proposed Rule Making and Order to Show Cause, Jerry Snyder and Associates, Inc. ("JSA"), Heftel, Hunt Broadcasting, Inc., and Metro Broadcasters filed Comments. JSA, Heftel, and Metro Broadcasters filed Reply Comments.²

5. The proposed Channel 237A substitution at Jacksboro in MM Docket No. 97-91 is mutually exclusive with the Channel 237C2 upgrade counterproposal for Station KHYI at Howe, Texas, advanced in MM Docket No. 97-26. For this reason and in the absence of an alternate channel for either Howe or Jacksboro, it is necessary to consolidate these proceedings.

MM Docket No. 97-26

6. We are allotting Channel 294C2 to Detroit, Texas, as a first local service.³ We are also allotting alternate Channel 222C2 to Antlers, Oklahoma, as a first local service.⁴ We are dismissing the Metro Broadcasters counterproposal for a Channel 237C2 upgrade at Howe, Texas. That counterproposal would require Station KITX, Hugo, Texas, to change its channel from Channel 238C2 to Channel 294C2. This counterproposal was defective because of the failure of Metro Broadcasters to state its willingness

²Graham Newspapers, Inc., licensee of Station KWKQ, Channel 296C3, Graham, Texas, filed a counterproposal proposing a Channel 296C2 upgrade for Station KWKQ. This counterproposal was filed after the comment date in this proceeding in contravention of Section 1.420(d) of the Rules and was contingent on Channel 237A being substituted for Channel 299A at Jacksboro, Texas. As such, this counterproposal is unacceptable for consideration in the context of this proceeding.

³The reference coordinates for the Channel 294C2 allotment at Detroit, Texas, are 33-49-16 and 95-24-16. This site is 22 kilometers (13.7 miles) northwest of Detroit.

⁴The reference coordinates for the Channel 222C2 allotment at Antlers, Oklahoma, are 34-12-45 and 95-42-13.

to reimburse the licensee of Station KITX for changing its channel. See Lonoke, Arkansas and Clarksdale, Mississippi, 6 FCC Rcd 4861 (1991); York, Alabama, 4 FCC Rcd 6923 (1989); Circleville, Ohio, 8 FCC 2d 159 (1967). Counterproposals must be technically and procedurally correct at the time of the filing. Fort Bragg, California, 6 FCC Rcd 5817 (1991); Bixley, Oklahoma and Coffeyville, Kansas, 3 FCC Rcd _____. After the comment and reply comment dates in this proceeding, Metro Broadcasters filed Supplemental Comments in which it stated its willingness to reimburse the licensee of Station KITX in Hugo for the costs of changing its channel. We cannot accept this late-filed submission to cure the Metro Broadcasters counterproposal because it would prejudice the mutually exclusive Heftel proposals in MM Docket No. 97-91. Scottsboro, Alabama, Trenton, Georgia, and Signal Mountain, Tennessee, 6 FCC Rcd 6111 (1991); Boalsberg, Pennsylvania, 7 FCC Rcd 7653 (1992).⁵

7. Even if we were to accept the Metro Broadcasters counterproposal in this proceeding, we would not have preferred the proposed upgrade at Howe, Texas, over the Lewisville and Robinson, Texas, reallocation proposals in MM Docket No. 97-91. As noted earlier, these proposals are mutually exclusive in that the Lewisville and Robinson reallocation proposals require that Channel 237A be substituted for Channel 299A at Jacksboro, and that the Howe upgrade proposal conflicts with this proposed Channel 237A substitution at Jacksboro. In evaluating these competing FM allotment proposals, our decision would have been based on the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982).⁶ In this instance, the Heftel proposal will provide first local services to Lewisville and Robinson, Texas, and result in a net service gain to approximately 3,248,422 persons and would have been preferred over the Metro Broadcasters proposal for an upgrade at Howe which would have served an additional 137,974 persons.

MM Docket No. 97-91

8. We are granting the two reallocation proposals. First, we are substituting Channel 300C1 for Channel 300C2 at Gainesville, Texas, are reallocating Channel 300C1 Lewisville, Texas, and are modifying the construction permit of Station KECS to specify operation on Channel 300C1 at Lewisville.⁷ Second, we are substituting Channel 300A for Channel 300C1 at Corsicana, Texas, are reallocating Channel 300A to Robinson, Texas, and are modifying the license of Station KICI to specify operation on Channel 300A at Robinson.⁸ These actions will provide a first local service to Lewisville, with a population of 46,521 persons, and Robinson, with a population of 7,111 persons. The reallocation of Channel 300A to Robinson warrants a preference as a first local service even though Station KICI will provide a 70 dBu signal to 70% of the Waco Urbanized Area. See Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995); see also RKO General (KFRC), 5 FCC Rcd 3222 (1990) and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). Robinson has its local government and elected officials, Chamber of Commerce, civic

⁵ 6. As stated earlier, the Metro Broadcasters counterproposal in MM Docket No. 97-26 for a Channel 237C2 upgrade at Howe, Texas is mutually exclusive with the Heftel proposal for a Channel 300C1 upgrade and reallocation to Lewisville, Texas, and the Channel 300A reallocation to Robinson, Texas. This mutual exclusivity arises because the Heftel proposals require that Channel 237A be substituted for Channel 299A at Jacksboro, Texas, while the Metro Broadcasters counterproposal for the upgrade at Howe requires that Channel 299A be retained at Jacksboro.

⁶The FM allotment priorities are as follows: 1) First fulltime aural service; 2) Second fulltime aural service; 3) First local service; and 4) Other public interest matters. Co-equal weight is given to priorities (2) and (3).

⁷The reference coordinates for Channel 300C1 at Lewisville, Texas, are 33-17-33 and 97-13-46.

⁸The reference coordinates for Channel 300A at Robinson, Texas, are 31-26-58 and 97-07-27.

organizations and independent school system. In addition to local businesses and commercial establishments, Robinson has its own medical and dental clinics. Finally, Robinson has its own fulltime police department, volunteer fire department and water treatment plant. In view of the foregoing, a first local service preference for Robinson would have been warranted even though Station KICI will provide a 70 dBu signal to 70% of the Waco Urbanized Area and the population of Waco is 103,590 persons compared to the Robinson population of 7,111 persons.

9. The Lewisville and Robinson reallocations will result in a net gain of service to 3,248,422 persons and the populations that will lose service will continue to receive at least five aural services. In this regard, we note that Gainesville will continue to receive local service from two fulltime aural services while Corsicana will continue to receive local service from one fulltime aural service. To accommodate these reallocations, we will also substitute Channel 237A for Channel 299A at Jacksboro, Texas, and modify the Station KJKB construction permit to specify operation on Channel 237A.⁹ In accordance with Circleville, Ohio, 8 FCC 2d 159 (1967), Heftel will be required to reimburse Hunt Broadcasting, Inc., permittee of Station KJKB, for the costs incurred in changing its channel.

10. The Channel 237A substitution at Jacksboro conflicts with the Channel 240C1 allotment at Mineral Wells, Texas. In its Petition for Rule Making, Heftel proposed that this allotment be downgraded to Channel 240C3. In regard to the Mineral Wells allotment, Heftel referred to our Report and Order in MM Docket No. 90-555, 7 FCC Rcd 1791 (1992), in which we modified the license of Station KYXS, Channel 240C3, Mineral Wells, Texas, to specify operation on Channel 240C1. The construction permit to implement that upgrade expired October 15, 1994, and was cancelled on December 13, 1994. Thereafter, JSA, licensee of Station KYXS filed a second application to implement its Channel 240C1 upgrade at Mineral Wells (File No. BPH-961125IG). In regard to the channel allotment at Mineral Wells, the Order to Show Cause in this proceeding proposed modification of the Station KYXS license to specify operation on Channel 240C3. JSA filed Comments and Reply Comments in opposition to this proposed downgrade.

11. On February 12, 1998, Heftel and JSA filed Joint Reply Comments proposing a resolution of this matter. Pursuant to the proposed resolution, JSA would amend its pending application to a site approximately 43 kilometers (26.7 miles) southwest of Mineral Wells. In turn, this would permit the Channel 237A substitution at Jacksboro. In the Joint Reply Comments, Heftel and JSA recognize that JSA will incur a significant expense in securing the new transmitter site and this Class C1 facility will serve fewer persons and "be less commercially viable" than the current proposed Class C1 facility at Mineral Wells. In recognition of this fact, Heftel has agreed to compensate JSA for amending its application and the decrease in the value of its Class C1 facility at Mineral Wells.

12. We have reviewed this settlement proposal in conjunction with Section 1.420(j) of the Rules and Amendment of Section 1.420 and 73.3528 of the Commission's Rules Concerning Abuses of the Commission's Processes ("Abuses of Processes"), 5 FCC Rcd 3911 (1990). In Abuses of Processes, the Commission determined that compensating a party in an allotment rulemaking proceeding for the withdrawal of its counterproposal or an expression of interest is limited to the legitimate and prudent expenses incurred in advancing the proposal. This limitation also applies to proposals that are "functionally equivalent" to a counterproposal such as a one-step upgrade application filed by the comment date in the rulemaking proceeding.

13. Inasmuch as the JSA application was pending on the comment date in this proceeding, we

⁹The reference coordinates for Channel 237A at Jacksboro, Texas, are 33-13-06 and 98-09-48.

must consider this settlement under the restrictions set forth in Abuses of Processes. Under Abuses of Processes, we cannot approve, in the context of this proceeding, the aspect of this settlement which permits JSA to receive consideration in excess of its legitimate and prudent expenses. This restriction applies with respect to either the dismissal or modification of the pending JSA application proposing Class C1 facilities at Mineral Wells. Unlike the situation in Thunderbolt Broadcasting Company, 13 FCC Rcd 6959 (1998) which involved a change in an existing authorization, JSA is being compensated for amending a pending application to a site that will be "less commercially viable" which clearly appears to be in excess of its actual expenses in amending its application and relocating to the new site. C.f. The Dalles and Corvallis, Oregon, 13 FCC Rcd 6596 (1998), recon. pending. To this end, we will modify the Station KECS construction permit to specify operation on Channel 300C1 at Gainesville, the Station KICI license to specify operation on Channel 300A at Robinson, and the Station KJKB construction permit to specify operation on Channel 237A. However, in each instance, program test authority is being withheld pending grant of a construction permit for Station KYXS at Mineral Wells that would accommodate a Channel 237A operation by Station KJKB at Jacksboro, and a certification of compliance with Section 1.420(j) of The Rules by JSA and Heftel.

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303 (g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective October 6, 1998, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Detroit, Texas	294C2
Gainesville, Texas	-----
Jacksboro, Texas	237A
Lewisville, Texas	300C1
Robinson, Texas	300A
Antlers, Oklahoma	284A, 222C2

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Heftel Broadcasting Corporation for Station KECS, Channel 300C2, Gainesville, Texas, IS MODIFIED to specify operation on Channel 300C1 at Lewisville, Texas, in lieu of Channel 300C2 at Gainesville, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may not be conducted in accordance with Section 73.1620 of the Rules unless Station KYXS, Mineral Wells, Texas, has been granted a construction permit for Class C1 facilities at a site that would accommodate an operation on Channel 237A by Station KJKB, Jacksboro, Texas; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act

of 1934, as amended, the license of Heftel Broadcasting Corporation for Station KICI, Channel 300C1, Corsicana, Texas, IS MODIFIED to specify operation on Channel 300A at Robinson, Texas, in lieu of Channel 300C1 at Corsicana, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may not be conducted in accordance with Section 73.1620 of the Rules unless Station KYXS, Mineral Wells, Texas, has been granted a construction permit for Class C1 facilities at a site that would accommodate an operation on Channel 237A by Station KJKB, Jacksboro, Texas; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Hunt Broadcasting, Inc. for Station KJKB, Jacksboro, Texas, IS MODIFIED to specify operation on Channel 237A in lieu of Channel 299A, subject to the following conditions:

- (a) Nothing contained herein shall be construed as authorizing any change in the authorization for Station KJKB except for the channel as specified above. Any other change, except for those specified under Section 73.1260 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301);
- (b) Program tests may not be conducted in accordance with the provisions of Section 73.1620 of the Rules unless Station KYXS, Mineral Wells, Texas, has been granted a construction permit for Class C1 facilities that would accommodate an operation on Channel 237A by Station KJKB at Jacksboro. PROVIDED, that when program test authority does commence, the transmission facilities comply in all respects with the station's authorization except for the channel specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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